IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 40

WILLIAM HOAG,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of New Jersey

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Constitutional Provisions and Statutes Involved

The clauses of the Constitution of the United States cited or relied upon are:

(1) Fifth Amendment which provides:

> "* * * nor shall any person be subject, for the same offense, to be twice put in jeopardy of life and limb; * * *"

(2) Sixth Amendment, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, * * *"

(3) Fourteenth Amendment, which provides:

> "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The clauses of the Constitution of New Jersey cited or relied upon are:

(1) Art. I, Par. 10 which provides:

> "In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; * * *"

(2) Art. I, Par. 11 which provides:

> "No person shall, after acquittal, be tried for the same offense. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great."

The New Jersey Supreme Court rule which is involved here, other than Rules 2:4-15 and 2:5-4, which are cited by the Petitioner, is Revised Rule 3:5-2 which provides:

> "A defendant may plead not guilty, guilty, non vult or nolo contendere, excepting, however, that no defendant can plead guilty to murder save as provided by law. The court may refuse to accept a plea of guilty, non vult or nolo contendere, and shall not accept such plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty, the court shall enter a plea of not guilty."

Counter-Statement of the Questions

1. Whether consistently with due process of law, a state may convict on an indictment for robbery from a fourth person after a general verdict of acquittal on indictments for robbery of three other persons at the same time and place?

2. Whether the issue of non-participation in one of several practically simultaneous offenses is determined by a general verdict of acquittal on another of the offenses after a plea of not guilty, where at the trial the defendant offered evidence only in support of an alibi, but where under the state law the burden remains on the state to prove every element of the crime beyond a reasonable doubt?

3. Whether the law of a state holding a negative answer to question 2 is such a denial of fundamental liberty as to violate the Fourteenth Amendment to the Constitution of the United States?

4. Whether the delay incident to two successive trials for different offenses involving common questions of law and fact, under the particular circumstances, is such a denial of the criminal defendant's right to a speedy trial as to require this Court to reverse a judgment of conviction affirmed by the highest court of a state?

Counter-Statement of the Case

The Supreme Court of the United States is reviewing upon writ of certiorari the judgment of the Supreme Court of New Jersey, which upon appeal affirmed the conviction of the petitioner William Hoag for the armed robbery of Elmer Yager on September 20, 1950.

Three indictments against William Hoag, John Doe and Robert Roe, charging armed robbery of Patsy Cascio, Louis

Capezzuto and Charles Galiardo were returned by the Bergen County Grand Jury on June 26, 1951 (R. 1-3; 10). Five witnesses appeared before the Bergen County Grand Jury on June 26, 1951, but not including Elmer Yager, according to the Grand Jury minutes which are not of record before this Court. The statement in the dissenting opinion of the New Jersey Supreme Court (R. 211) that Yager was a witness before the Grand Jury on the first presentation is without support in the record and must have been founded upon a misunderstanding at the oral argument.

As summarized in the Statement by petitioner, the alleged armed robbery occurred at Gay's Tavern in Fairview, Bergen County, during the afternoon of September 20, 1950. At the trial of the three indictments on May 26 and 27, 1952, there was unrefuted testimony that three or more robbers (R. 44; 52; 54; 57-58) took property by force from patrons of Gay's Tavern, as well as from the proprietor, Charles Galiardo, known as Gay (R. 19; 20; 44; 45; 53; 54; 58). The witnesses for the State were the three victims, together with Anthony Dottino and Elmer Yager, each of whom testified that property had been taken from him under threat of a gun (R. 44; 58). At the time of the trial, no indictment had been returned charging armed robbery of Anthony Dottino or Elmer Yager.

The Fairview Police took written statements from Cascio, Capezzuto, Galiardo and Yager on the day of the armed robbery at Gay's Tavern (R. 156; 157). A composite description of one of the robbers, which appeared in the police blotter entry, conformed approximately to William Hoag's description: "6 foot 2 inch in height, about 150 to 170 pounds, between the ages of 25 and 30, wore brown pants and sport jacket, open collared shirt, carried a small white revolver and wore glasses." (R. 154). Galiardo and Dottino both identified a photograph of Hoag as one of the armed robbers within the next few days (R. 33; 40; 45;

143). Several weeks later Yager similarly identified a photograph of Hoag from among several photographs shown to him at Gay's Tavern (R. 117). Galiardo, Dottino and two other men not identified in the record were taken in July, 1951 to Police Headquarters at Center Street, New York City (R. 195-198). Galiardo and Dottino made statements identifying a photograph of Hoag (R. 196; 197). These two, with Cascio and Capezutto, failed late in 1951, after Hoag's arrest in New York (R. 180), to pick him from a line up of suspects (R. 93-94). On or about December 10, 1951, Yager went with another county detective to New York City and positively identified Hoag out of a line up (R. 93; 117; 161; 169).

A requisition of the Governor of New Jersey, dated December 18, 1951, demanded the extradition of William Hoag from the State of New York to the State of New Jersey for the trial of the three indictments. The fugitive waived extradition proceedings (R. 109), pursuant to the Uniform Criminal Extradition Act (N.J.S. 2A:160-30; 66 (Part 2) McKinney's N. Y. Laws Sec. 851 (Supp. 1957)).

Despite the identifications of Hoag's photograph by Galiardo and Dottino, only Yager testified that Hoag was one of the participants in the holdup at the trial of the Capezzuto, Cascio and Galiardo indictments. Galiardo testified: "This Mr. Hoag looks like the man that was in my place." (R. 22). Dottino acknowledged that he had signed a paper identifying Hoag as one of those involved in the robbery but testified at the trial: "It looks like the man but I'm not positive." (R. 45). Yager confirmed his previous specific identification (R. 58). The two alleged victims, other than Galiardo, both testified that they were unable to identify anyone in the court room as one of those involved in the armed robbery (R. 53; 55). The defendant, without supporting witnesses, testified to an alibi that he had stayed "all day long" or most of the day on September

20, 1950 at the home of his mother-in-law in New York City (R. 90).

The victims named in the indictments testified to the elements of robbery under the New Jersey statute (former R.S. 2:166-1). The addendum to the Statement in Lieu of Record, which is referred to in the dissenting opinion below (R. 210), stipulated no "dispute" of the fact of the robbery or that Cascio, Capezzuto and Galiardo were victims. The stipulation was not binding except as to the circumstances evident in the full record: that no evidence rebutting the State's case on the elements of robbery had been offered, that the defendant relied on an alibi and that the single contested issue at the trial was the identification of William Hoag as a participant.

After the verdict of acquittal on the Cascio, Capezzuto and Galiardo indictments (R. 5-6), William Hoag again waived extradition and was returned to New York State on May 28, 1952, for imprisonment for parole violation (R. 189). A complaint charging Hoag with armed robbery of Elmer Yager at Gay's Tavern on September 20, 1950 was brought before the Bergen County Grand Jury two months after the judgment of not guilty on the first three indictments. The Grand Jury returned a fourth indictment against him on July 17, 1952. His subsequent return to New Jersey on May 11, 1954 from a New York penal institution (R. 161; 189) was pursuant to an extradition warrant of the Governor of New York.

Elmer Yager was the State's single witness, except on rebuttal, at the second trial of William Hoag on October 18, 1954, in the Bergen County Court. Yager made the same positive identification (R. 113; 118). On cross examination when pressed as to how he could be sure of the defendant's identity, the witness used this graphic language: "Anybody would have a gun stuck into them, they would sure remember the fellow's face, directly in front." (R. 134).

The defense called Galiardo, Dottino, Capezzuto and Cascio as witnesses. All four repeated their testimony at the first trial that they were unable to make a positive identification (R. 143) or that Hoag was not one of the participants in the armed robbery (R. 137; 149; 151). Hoag reiterated his alibi defense (R. 162). The State produced Detective DeMarco of the Bergen County Prosecutor's Office as a rebuttal witness. Statements by Galiardo and Dottino identifying Hoag's photograph were marked in evidence for the purpose of attacking their credibility (R. 196-198).

The trial of William Hoag for armed robbery of Elmer Yager resulted in a verdict of guilty. The judgment of conviction was sustained on appeal in the highest court of New Jersey and is now before this Court because of the asserted deprivation of due process of law by the State courts in violation of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

POINT I

William Hoag was not placed in double jeopardy in violation of constitutional safeguards by his trial and conviction for the armed robbery of Elmer Yager.

The protection after acquittal against trial for the same offense is a safeguard in the Constitution of New Jersey (Art. I, par. 11). By the Fifth Amendment, the Government of the United States is barred from subjecting any person to being put twice in jeopardy of life and limb for the same offense. Although not developed as such, the petitioner's argument here presumably is that the right against double jeopardy is a fundamental liberty safeguarded by the Fourteenth Amendment against denial by the States.

The scope of the Fourteenth Amendment in double jeopardy cases is not germane in the proceeding before this Court on a writ of certiorari.* This is not a double jeopardy case. Under established rules of New Jersey, as well as in other common law jurisdictions, the petitioner Hoag was not retried for the same offense after acquittal. He was acquitted of the crimes of armed robbery of Patsy Cascio, Louis Capezzuto and Charles Galiardo. The conviction now under review is for the crime of armed robbery of Elmer Yager, a separate offense although occurring at the same place and at approximately the same time as the robberies of the other three victims. The Supreme Court of New Jersey in *State* v. *Hoag*, 21 N. J. 496 (1956) (R. 200) applied the law of the state in determining that the defendant Hoag was not tried twice for the same offense. This determination is valid in accordance with general law as well as New Jersey law, under the recognized tests of double jeopardy.

The same evidence that was necessary to sustain the fourth indictment would not have been sufficient to secure a conviction on the first three indictments. The crime of armed robbery requires proof of putting the victim in fear and taking property forcibly from his person. Such evidence in support of the indictment for armed robbery of

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* See *Palko* v. *State of Connecticut*, 302 U. S. 319 (1937) and *Brock* v. *State of North Carolina*, 344 U. S. 424 (1953) which recognize that a retrial of a criminal defendant by any state may constitute a denial of the fundamental essentials of due process of law in violation of the Fourteenth Amendment. The *Palko* case reviewed a state court judgment of conviction upon a retrial after a previous state court judgment had been reversed for legal error, upon an appeal by the state pursuant to statute. The *Brock* case brought before this Court the issue of the validity of a state court conviction, after a previous mistrial upon the motion of the state because two state's witnesses refused to testify on the grounds of the privilege of self-incrimination. This Court sustained the judgments of conviction in both cases.

Yager would have been without bearing on the separate charges for armed robbery of Cascio, Capezzuto and Galiardo. In addition to *State* v. *DiGiosia*, 3 N. J. 413 (1950); *State* v. *Labato*, 7 N. J. 137 (1951) and *State* v. *Shoopman*, 11 N. J. 333 (1953), which are cit[illegible] in the majority opinion (R. 204); *State* v. *Rosa*, 72 N. J. L. 462 (E. & A. 1905) and *State* v. *Chevencek*, 127 N. J. L. 476 (Sup. Ct. 1941) are in accord that the plea of *autrefois acquit* is available only where there is identity of the offenses charged in the first trial, resulting in acquittal, and in the subsequent prosecution. As Chief Justice BROGAN stated in *State* v. *Chevencek*, at 127 N. J. L. 479: "'If the offenses be distinct at law it is immaterial that they may be close in point of time.''

The Supreme Court of New Jersey in *State* v. *DiGiosia* summarized the New Jersey and common law at 3 N. J. 418:

> "It is an ancient principle of the common law that one may not be twice put in jeopardy for the same offense. The pleas of *autrefois acquit* and *autrefois convict* are grounded on the maxim that 'a man shall * * * not be brought into danger of his life for one and the same offense more than once.' *Hawkins' Pleas of the Crown*, pp. 515, 526. Blackstone stated the doctrine to be that 'when a man is once fairly found not guilty upon an indictment, or other prosecution, before any court having competent jurisdiction of the offense, he may plead such acquittal in bar of any subsequent accusation for the same crime;' it protects against a second prosecution 'for the same identical act and crime.' 4 *Blackstone's Comm.* 335, 336. Chitty said that both these pleas depend on the principle that 'no man shall be placed in peril of legal penalties more than once upon the same accusation.' 1 *Chitty Cr. L.* 452, 462.''

The "single act" test of double jeopardy is as plainly inapplicable. Even if it is assumed without proof that the defendant or his fellow participants in the armed robbery brandished a gun once only, each victim was individually put in fear and robbed of property of value. The forcible takings occurred necessarily at divergent times. New Jersey cases, such as in *State* v. *Cosgrove*, 103 N. J. L. 412 (E. & A. 1927) (manslaughter of one victim and atrocious assault and battery upon another victim because of knocking both down at once by automobile) and *State* v. *Pennsylvania Railroad Co.*, 9 N. J. 194 (1952) (manslaughter of 84 persons in a train wreck) have held that a single act resulting in multiple criminal offenses against several persons could not be retried after acquittal on an indictment upon complaint of one of the victims.

These decisions are inapplicable because separate acts were involved in the robberies of Cascio, Capezzuto, Galiardo and Yager, separate intimidations and separate takings by force. In the language of the Superior Court, Appellate Division, the robbing of Yager "was not an essential ingredient or legally integral part of the alleged offenses of robbing the other three" (R. 17).

POINT II

Defendant Hoag's acquittal on the charge of robbing three alleged victims was not res judicata on the charge of robbing a fourth victim.

Whether the defense of res judicata must be accorded weight by the states in criminal proceedings as a matter of fundamental due process of law need not be decided here. Under established rules in New Jersey and elsewhere, res juricata bars a retrial of the same cause of action between the same parties. After a judgment of acquittal in a criminal case, res judicata merges with double jeopardy as a defense against a subsequent prosecution for the same

offense. Res judicata alone protects where there is a final judgment for defendant before jeopardy has attached. *United States* v. *Oppenheimer*, 242 U. S. 85 (1916). Double jeopardy is available in instances where the first proceeding failed to result in a judgment on the merits but jeopardy did attach. Cf. *Brock* v. *State of North Carolina, supra.*

The criminal liability of William Hoag for the robbery of Elmer Yager was not adjudicated in the trial of the three indictments on May 26 and 27, 1952. The issues at that trial were whether the defendant Hoag had committed armed robbery or aided and abetted in an armed robbery of Cascio, Capezzuto and Galiardo. The parties remained the same in the second trial but the subject matter, the robbery of a fourth victim, was different. The acquittal of May 27, 1952 was not a judgment of not guilty of the crime of armed robbery of Elmer Yager.

The Supreme Court of New Jersey held here that robbery of several persons where property is removed from each person involves a separate criminal act. That determination accords with established basic principles excluding double jeopardy and res judicata on a retrial after acquittal of the crime of robbery of another alleged victim.

POINT III

The first trial of the defendant Hoag was not a conclusive adjudication that he was not present at the robbery, barring a retrial on the doctrine of collateral estoppel.

William Hoag invokes the doctrine of collateral estoppel as within the protection of the Fourteenth Amendment. According to the argument here, as well as before the Supreme Court of New Jersey, the acquittal in the first trial necessarily determined the issue of identity in the criminal defendant's favor and that issue, once having been adjudi-

cated between the same parties, cannot be resubmitted to a jury at a second trial.

Petitioner cites no cases holding that collateral estoppel must be applied by the states in criminal cases as part of fundamental due process of law. There is indecisive authority on the shield of the Fourteenth Amendment in double jeopardy and res judicata cases. A determination by this Court that the Supreme Court of New Jersey erred in holding collateral estoppel unavailable would vest this defense, which appears more remote from fundamental liberty, with a sanctity not specifically accorded in any prior case to double jeopardy and res judicata.

To rule thus the Court must hold (1) that the issue of identity was determined in the first trial of William Hoag, contrary to New Jersey law, and (2) that the failure to lend decisive effect to collateral estoppel was a denial of the fundamental essentials of a fair trial under due process of law.

The doctrine of collateral estoppel emerged in civil cases. See *Cromwell* v. *County of Sac*, 94 U. S. 351 (1876); *Restatement, Judgments*, Sec. 68, scope note at p. 2; Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1 (1942). As expressed in the *Restatement, Judgments*, Sec. 68:

> "Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action * * *."

The issue of identity was not finally determined in the trial of William Hoag for the armed robbery of Cascio, Capezzuto and Galiardo. The jury rendered a final verdict of not guilty. The prosecution had therefore failed in its

burden of establishing the guilt of the defendant of the crime of armed robbery beyond a reasonable doubt, to the satisfaction of the jury. In New Jersey, as well as in other common law jurisdictions, the burden of proof is upon the State and that burden never shifts. The State cannot be granted a directed verdict in criminal cases. Despite the unrefuted testimony and evidence that each alleged victim, Cascio, Capezzuto and Galiardo, was put in fear and had property forcibly taken from him, the defendant had an unchallengeable right to a jury determination of the facts of putting in fear, forcible taking of property and of criminal intent. O'Regan & Schlosser, *New Jersey Criminal Practice* (Rev. Ed.), Sec. 367.

In *State* v. *Greeley*, 30 N. J. Super. 180, 186 (Co. Ct. 1954) it was stated: "* * * [T]he court has no power to direct the jury to convict. While it is within the court's right, in a case where evidence of guilt is virtually uncontroverted, to indicate to the jury its corresponding duty in the circumstances, the fact is that any precept thus imparted is reversible error when it is such as fails to leave the jury entirely free to reject it."

According to the dissenting opinion of the Supreme Court of New Jersey, the county prosecutor was unable in oral argument to suggest an alternative hypothesis for the first acquittal other than the jury's finding that Hoag did not participate in the robbery at Gay's Tavern (R. 211). The alternative hypotheses are that the jury did not believe that Cascio, Capezzuto or Galiardo were put in fear or that property was forcibly taken from them.

The jury realized that all three were called as State's witesses and may have concluded that their testimony was not to be trusted because of apparent retraction of previous identifications. The jury may have believed erroneously that, if the victim of a crime does not identify the

criminal, the state is without power to prosecute. The prosecution may have been viewed by the jury as within the control of the victims of the crime; upon an indication that the prosecution was against the wishes of the alleged victims, the jury may have decided that an acquittal was a just disposition. Errors of law by a jury are not appealable in New Jersey. This Court has sustained inconsistent verdicts of conviction in *Dunn* v. *United States*, 284 U. S. 390 (1932) and *United States* v. *Dotterweich*, 320 U. S. 277 (1943).

There can be no certainty that the jury in the first trial of Hoag determined that Hoag's alibi was valid or that he was not one of the armed robbers or participants in the armed robbery at Gay's Tavern. A general verdict cannot be probed under these circumstances. *Sealfon* v. *United States*, 332 U. S. 575 (1948) and *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558 (1951), both arising on appeal from the lower Federal courts and not authorities on the availability of the Fourteenth Amendment in collateral estoppel cases, are relied upon by petitioner but are plainly distinguishable.

Under the facts in the *Sealfon* case, a criminal defendant sought a reversal of a conviction for uttering false invoices in violation of Sec. 332, Criminal Code, 18 U. S. C. A. Sec. 550, because of a prior acquittal on a complaint for conspiracy to defraud the United States by presenting false invoices in violation of Sec. 28, Criminal Code, 18 U. S. C. A. Sec. 72. The second prosecution was for the substantive offense and was considered upon overwhelming authority as a separate and distinct offense from the conspiracy to commit it. The appellate issue therefore was the collateral estoppel effect of the determination in the first trial that the defendant had not conspired with one Greenberg to defraud the government by presenting false invoices and making false representations that sales of

syrup had been made to the Brooklyn Navy Yard. The only evidence in the first trial linking Sealfon with the conspiracy was a letter written by him to Greenberg stating that "Some of our syrups are being sold to the Brooklyn Navy Yard." At the second trial the same letter was introduced as the only evidence that Sealfon had aided and abetted Greenberg in the commission of the crime of uttering false invoices. The Court in an opinion by Justice DOUGLAS concluded: "It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent." The holding of *Sealfon v. United States* authorizes an inquiry into a verdict of acquittal only to determine the extent it adjudicated the guilt or innocence of a substantive offense, there writing a letter pursuant to an agreement to defraud. The acquittal at the conclusion of the first trial of William Hoag was not an adjudication that the defendant had not committed the criminal offense charged at the second trial or, because of the general verdict, that he was not present or a participant in the Gay's Tavern holdup.

Likewise in the *Emich Motors Corp.* case, the collateral estoppel effect of a criminal conviction in a subsequent civil proceeding was extended only to the issues necessarily determined. By statute, 38 Stat. 731, 15 U. S. C. A. Sec. 16, final judgments in criminal prosecutions under the anti-trust laws are established as prima facie evidence in civil proceedings brought by any victim for redress for the anti-trust law violation. The Court in an opinion by Justice CLARK held that the criminal judgment was prima facie evidence of the general conspiracy and that to establish a prima facie case the petitioners needed only to produce evidence of the impact of the conspiracy on them, such as the cancellation of their franchises and the purpose of General Motors in cancelling them, as well as evidence of any resulting damages.

The circumstances of the *Emich Motors* case, as well as of the *Sealfon* case, do not support the petitioner Hoag's position that a scrutiny may be made into a general verdict of acquittal, leading to the speculative conclusion that it determined one of several issues in favor of the criminal defendant. Neither legal theory nor fundamental justice supports that position.

The burden is on the defendant Hoag claiming a collateral estoppel to establish the final determination of the issue of identity at his first trial. That burden has not been met and cannot be met because of the general verdict determining that he was not guilty of three offenses other than the offense here charged.

New Jersey procedure fails to provide any plea of collateral estoppel in criminal cases. The unavailability of any form of procedural relief is a decisive indication of a lack of substantive right to urge collateral estoppel as to one of several issues encompassed by a general verdict of acquittal.

R.R. 3:5-2 sets forth the pleas in criminal cases: guilty, not guilty, non vult and nolo contendere. The additional common law defenses of autrefois acquit and autrefois convict are still recognized because of the constitutional safegu d against double jeopardy in Art. I, Par. 11 of the State Constitution of 1947.*

The plea of autrefois acquit was not raised by the defendant Hoag despite his assertion of double jeopardy (R. 159). Because he was not tried for the armed robbery of Elmer Yager, his acquittal at the first trial was no support to the defense of autrefois acquit under established and New Jersey common law principles. He was not retried for the same offense. (See Points I and II, *supra.*)

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* *State* v. *Labato*, 7 N. J. 137, 143 (1951); *State* v. *Shoopman*, 11 N. J. 333, 336 (1953).

The highest court of New Jersey held in *State* v. *Dragone*, 99 N. J. L. 144 (E. & A. 1923) that evidence of a prior acquittal was not admissible as a defense under the general issue raised by a plea of not guilty. Double jeopardy as a defense is waived unless specifically pleaded by autrefois acquit or autrefois convict or by a motion for dismissal under the rules of the New Jersey Supreme Court (R.R. 3:5-5). *In re Hall*, 94 N. J. Eq. 108 (Ch. 1922), a habeas corpus proceeding, is in accord with *State* v. *Dragone* that a waiver of the issue of double jeopardy is conclusive upon a criminal defendant. The procedural law is a confirmation that criminal defendants may not resort to collateral estoppel in asserting conclusiveness to a general verdict upon less than all issues.

One of the decisions of the new Supreme Court, *State* v. *Shoopman*, 11 N. J. 333 (1953) illustrates the limitations on collateral estoppel under New Jersey law. A defendant, charged with the criminal offense of causing death by driving an automobile recklessly, pleaded autrefois acquit based upon his acquittal of the motor vehicle offense of reckless driving. The Supreme Court held that the adjudication that the defendant was not guilty on the reckless driving charge was not decisive in the criminal prosecution. Justice WACHENFELD in a majority opinion wrote at 11 N. J. 336:

> "Article I, paragraph 11, of the Constitution of 1947, which substantially follows the Fifth Amendment of the United States Constitution, reads: 'No person shall, after acquittal, be tried for the same offense.'
>
> "Keeping in mind the constitutional provision set out, does the judgment of the court below contravene either the spirit or the language of the mandate or trespass upon fundamental justice? We think not, because 'reckless driving' and 'death by reckless driving' are not 'the same offense.' One is a crime; the other is not. Each is specifically and separately de-

fined and the one has an element foreign to and not required in the other.

"The two offenses are not identical and the evidence required to convict on the reckless driving charge, while admissible and relevant in proving the more serious offense, is not by itself sufficient to sustain the charge laid in the indictment."

Petitioner Hoag is not denying guilt before this Court, although his plea was not guilty. He is attacking instead the adjudication of the New Jersey courts that the general verdict of acquittal at his first trial did not finally determine that he was not a participant in the armed robbery at Gay's Tavern. Hoag cannot with certainty establish that the first acquittal was in his favor on the issue of identity. Within the province of New Jersey law, the State Supreme Court has determined that double jeopardy, res judicata and collateral estoppel all are inapplicable. That determination is not at war with fundamental due process of law.

POINT IV

The re-indictment and retrial of Hoag did not violate fundamental justice under any other principle.

Petitioner Hoag colors his brief here with references to the requirement of proof beyond a reasonable doubt, the right to counsel and other safeguards of liberty enshrined in Anglo-American society (Pet. Br. 16-17). Those references are irrelevant to the review of the New Jersey Supreme Court judgment. Hoag is not arguing and on the record cannot argue lack of proof beyond reasonable doubt, partiality of the judge, denial of the right to counsel, the use of perjured testimony, or the knowing withholding of relevant evidence.

The State failed to indict Hoag for the armed robbery of Elmer Yager until after the first trial. The New Jersey

Supreme Court rules on joinder of offenses in criminal cases then in force did not make mandatory the joinder within one indictment of offenses based on the same criminal transaction or involving common questions of law and fact, or the joinder for trial of two or more indictments which could have been joined in a single indictment. The rules of joinder are discretionary. The record fails to disclose why no indictment charging armed robbery of Elmer Yager was returned in July, 1951 at the time of the Cascio, Capezzuto and Galiardo indictments. The State's prospects for a conviction would presumably have been enhanced by the joinder of an indictment for armed robbery of Yager, because of his positive identification of Hoag by photograph and in the police line up.

Joinder is, in fact, impossible in many cases. The complaining witnesses in one transaction involving multiple criminal offenses may not be available within the State. A holding by this Court in favor of the petitioner Hoag would require the State either to withhold prosecution for one of multiple crimes arising out of a criminal transaction until all victims were on hand as witnesses, or, in the alternative, to go to trial in the absence of one or more complaining witnesses who may have detailed and accurate testimony, without any further power to prosecute for the separate offenses not there tried. The clearer recollection and more detailed account by Elmer Yager as a witness is impressive in a reading of the transcripts of the two trials of William Hoag.

By arguing that the retrial prejudiced his right to a fair trial, the petitioner Hoag is apparently of the view that he has only a 50-50 or equal prospect of a just verdict.

Several United States Supreme Court cases have pointed to the factors of malice or deliberate harassment as significant in cases involving retrials on the issue of double jeopardy. Justice Cardozo in *Palko* v. *State of Connecti-*

cut, supra, noted that the State was "not attempting to wear the accused out by a multitude of cases with accumulated trials." The lack of malice in the electric chair failure in *State of Louisiana* v. *Resweber*, 329 U. S. 459 (1947) was decisive. In the concurring opinion in *Brock* v. *State of North Carolina, supra,* Justice FRANKFURTER commented:

> "A State falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time."

Justice FRANKFURTER's language is not in point here because defendant Hoag was not retried for a charge upon which he had been earlier acquitted. The record before this Court lacks any indication of callousness, malice, deliberate harassment or prejudice resulting from a retrial *per se*. The trial of the defendant William Hoag which resulted in the judgment of conviction now under review accorded with fundamental fair play by all tests.

POINT V

Defendant Hoag was not denied the constitutional right to a speedy trial as safeguarded by the Fourteenth Amendment.

The defendant William Hoag asserts a denial of his constitutional right to a speedy trial because the trial on the charge of armed robbery of Elmer Yager did not take place until forty-nine months after the robbery and twenty-nine months after the trial of the Cascio, Capezzuto and Gallardo indictments. This interval is attacked as a "state induced delay" (Pet. Br. 29).

The delay resulted in large part from Hoag's complications with the criminal law of two states, New Jersey and New York. He was not arrested until more than one year after the robbery at Gay's Tavern. He waived extradition and was brought to New Jersey for trial of the first three indictments in January, 1952 (R. 109). He was returned to New York for imprisonment for violation of parole the day after his acquittal on the Cascio, Capezzuto and Galiardo indictments (R. 189) again without extradition. At the time of the fourth indictment on July 17, 1952, Hoag was in a New York penal institution. The State of New Jersey reacquired Hoag upon the extradition warrant of the Governor of New York for the trial of the Yager indictment, on May 11, 1954. The second trial, resulting in conviction, was held on October 18, 1954 at the next term of the Bergen County Court, Law Division, Criminal, which was not in session for criminal trials during the summer months.

The extended periods during which (1) Hoag was a fugitive from justice (R. 163; 180; 191; 192) and (2) he was imprisoned in another state should not be computed in any total time period amounting to an alleged delay of the right to a speedy trial, in violation of the constitutional guarantees.

The failure to try Hoag from May to October, 1954, was likewise not a deprivation of due process of law. Hoag was imprisoned awaiting trial during this interval because of his inability to post bond. The New Jersey Constitution in Art. I, par. 11 guarantees the right of bail except in capital cases. But there is no constitutional right to be free without bail. As stated in *United States* v. *Rumrich*, 180 Fed. 2d 575, 576 (2d Cir. 1950):

> "A person arrested upon a criminal charge who cannot give bail, has no recourse but to move for trial.

> If upon the return of such a motion the court should deny him the speedy trial to which the constitution entitles him, it may be that he should be released on habeas corpus * * * ".

New Jersey formerly had the two-term rule to insure speedy trials. A criminal defendant indicted in one term of court was entitled to trial before the conclusion of the next term of court.* That rule was supplanted by Supreme Court Revised Rule 3:11-3, equally protecting the criminal defendant, which provides that, at any time after six months following the return of an indictment, the assignment judge may direct that the trial of the indictment be moved upon a day specified. The court may thereafter order the dismissal of the indictment upon failure of the prosecuting attorney to comply with the assignment judge's order.

The total time during which the defendant Hoag awaited trial, other than his period of approximately two years in prison in New York State, was less than six months after the return of the indictment for armed robbery of Elmer Yager. The dismissal of his indictment because of a delay attributable to his imprisonment in another state would have been an abuse of the assignment judge's discretion contrary to all practice. Whatever the outcome if he had moved for the fixing of a trial day, the defendant Hoag never so moved and must be deemed under New Jersey authority to have waived his rights to a speedy trial.

State v. *Appice*, 23 N. J. Super. 522 (App. Div. 1952), aff'd. 13 N. J. 286 (1953), cert. denied 346 U. S. 939 (1954) is decisive of the New Jersey law. In *State* v. *Appice*, a

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* *State* v. *Bilts*, 76 N. J. L. 410 (Sup. Ct. 1908); *Patterson* v. *State*, 50 N. J. L. 421 (E. & A. 1888). See *Petition of Provoo*, 17 F.R.D. 183, 196 (D. Md. 1955).

prisoner serving a sentence for another crime moved to dismiss indictments for attempted robbery and assault with intent to kill, which had been returned against him four and a half years earlier. The New Jersey Supreme Court affirmed the denial of the defendant's motion on the opinion of the Superior Court, Appellate Division. The prisoner had never applied to the assignment judge or any other judge to fix a specific date for trial pursuant to the predecessor rule to R.R. 3:11-3. The Appellate Division characterized the right to a speedy trial as a personal right subject to waiver, and noted further the lack of proof of prejudice against the defendant. In the *Hoag* case now under review before this Court there is a similar total failure to show any prejudice as a result of the alleged delay in the trial of the Yager indictment. Justice OLIPHANT of the New Jersey Supreme Court ruled decisively in *State* v. *Smith*, 10 N. J. 84, 93 (1952):

> "Defendants never had under the constitutional guaranty of a speedy trial the right to have an indictment dismissed; they merely could apply to the court to fix a day certain and on the failure of the State to proceed they could be discharged on their own recognizance or a judgment of acquittal entered."

Hoag claims prejudice in the intervening death of his mother-in-law (Pet. Br. 30), but he failed to produce her as a witness in support of his alibi at the first trial, although she was then alive (R. 183).

The Court of Appeals for the Seventh Circuit reviewed the applicability of the constitutional guarantee of a speedy trial to state court proceedings, under the Fourteenth Amendment in *Petition of Sawyer*, 229 F. 2d 805 (7th Cir. 1956), cert. denied 352 U. S. 860 (1956). The Court stated at p. 811:

> "* * * It is clear that the Federal Constitution does not give an absolute right to a 'speedy trial' as such to persons tried in state courts. The constitutional right to a 'speedy trial' is contained in the Sixth Amendment. It is common knowledge that the first ten amendments do not apply to state tribunals and that the Fourteenth Amendment, which does apply to the states, does not necessarily include all of the first ten. * * * Before we can order the release of a state prisoner for failure to obtain a 'speedy trial', we must be convinced that the failure resulted in the taking of the prisoner's liberty or property without due process of law."

The defendant Hoag was not deprived of due process of law in the failure to bring him to trial on the indictment for armed robbery of Elmer Yager between July 17, 1952 and October 18, 1954. He was imprisoned in New York most of this period and in Bergen County Jail awaiting trial for an additional period of five months because of his failure to post bail. The County Court was not open for criminal trials during the months of July and August, 1954. The delays were not prejudicial. Credit against his sentence for the time of imprisonment awaiting trial is guaranteed by the New Jersey Supreme Court Rules (R.R. 3:7-10(g)). Specific relief was available under the New Jersey Rules and cases by an application for the fixing of a date for trial. The defendant Hoag did not seek this relief or any relief to cut short his time awaiting trial. His assertion of a denial of his constitutional right to a speedy trial is without warrant in the facts, as well as procedurally barred.

CONCLUSION

The courts of New Jersey have determined that the trial of William Hoag for the armed robbery of Elmer Yager did not offend the constitutional guarantees of fundamental fair play and against double jeopardy. The State of New Jersey respectfully urges that the judgment of conviction was in accordance with due process of law and should be affirmed.

Respectfully submitted,

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